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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.07.2019

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THE HON'BLE DR.JUSTICE ANITA SUMANTH

W.P.(MD)Nos.8402 & 8403 of 2014
and M.P.(MD)Nos.1, 1, 2 & 2 of 2014

M/s.Shree Lakshmi Polymers,
Rep. by its Managing Partner – K.Sankar,
S.F.533/2, K.P.Kulam,
Renganathapuram (South) Village,
Krishnarayapuram Taluk,
Karur District. ... Petitioner in both petitions

-Vs-

The Commercial Tax Officer,
Kulithalai Assessment Circle,
Kulithalai. ...Respondent in all Petitions

Common Prayer: Writ Petitions are filed under Article 226 of Constitution of India, to issue a Writ of Certiorari calling for the records on the file of the respondent in his impugned proceedings of the respondent made in TIN:33783721601/2013-2014, dated 15.04.2014 and 23.04.2014, quash the same as illegal and contrary to the provisions of the Act.

For Petitioner : Mr.R.Hemalatha

For Respondent : Mr.S.Angappan
Government Advocate
(In both petitions)

COMMON ORDER

The orders impugned in these writ petitions are dated 15.04.2014 and 23.04.2014 and relate to the year 2013-2014. The issue on merits relates to transit passes obtained by the petitioner in respect of five transactions for transporting raw materials from Tamil Nadu to other States. Since the transit passes were not surrendered at the check posts, the value of one transaction dated 14.05.2013 in order dated 15.04.2014 and four transactions dated 23.05.2013, 19.05.2013, 24.06.2013 and 23.05.2013 in order dated 23.04.2014, have been brought to tax as deemed sales within the State. Before adverting to the issue on merits, the petitioner assails before me the very validity of the assessments.

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2.The period in question is 2013-2014. According to him, proper procedure as set out in terms of Section 22 of the Act has not been followed by the Assessing Authority, insofar as the impugned orders are passed in terms of Section 27 of the Act, which deals with revision of assessment.

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3.In defence, the learned Government Advocate states that reference in the order of assessment to Sections 27(1)(a) and 27(3)(c) is inadvertent and incorrect and the impugned proceedings should be taken to be original assessments in terms of Section 70 (2) (c) of the Act.

4.This submission is, straight away liable to be rejected. The provisions of Section 70 deal with the issuance of a transit pass and mandate a goods vehicle carrying any goods mentioned in the 6th schedule, coming from any place outside the State and bound for any place outside the State, that passes through the State of Tamil Nadu, to obtain a pass in the prescribed form for production before exit from the State at the last check post. This is not a machinery provision that would facilitate training of an order of assessment. The consequences of violation of Section 70 can only be felt by an assessee in an assessment made under Section 22 or Section 27 of the Act. The contention of the revenue that Section 70 is a machinery provision that provides for the framing of assessment is thus clearly mis-conceived and is rejected.

4.The Act provides for the following procedure for framing assessment in terms of either Section 22, Section 25 or Section 27 of the Act. The provisions are extracted below to the extents to which they are relevant:-

> "Procedure to be followed by Assessing Authority:
> 22 (1) The assessment in respect of the dealer shall be on the basis of return relating to his turnover submitted in the prescribed manner within the prescribed period.
> (2) The assessing authority shall accept the returns submitted for the year, by the dealer, if the returns are accompanied by the proof of payment of tax and the documents prescribed, and on such acceptance, the assessing authority shall pass an assessment order.
> (3) Notwithstanding anything contained in sub-section (2), not exceeding twenty percent of the total number of such assessments shall be selected by the Commissioner in such manner as may be prescribed for the purpose of detailed scrutiny regarding the correctness of the returns submitted by the dealer and in such cases, revision of assessment shall be made, wherever necessary.
> (4) If no return is submitted by the dealer for that year, the assessing authority shall, after making such enquiry as it may consider necessary,

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assess the dealer to the best of its judgment, subject to such conditions as may be prescribed:
Provided that before taking action under this sub-section, the dealer shall be given a reasonable opportunity of being heard.
....

(6) (a) Any dealer assessed under sub-section (4) may, within a period of thirty days from the date of service of the assessment order, apply to the assessing authority for re-assessment, along with the correct and complete return as prescribed. On such application, the assessing authority shall, if it is satisfied that the failure to submit the return in time was due to reasons beyond the control of the applicant, cancel the assessment made and make a fresh assessment on the basis of the return submitted:
Provided that no application shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of tax admitted by the applicant to be due or any such instalment thereof as might have become payable, as the case may be.
(b) If the amount of tax on the basis of the cancelled assessment has already been collected and if the amount of tax arrived at as a result of the fresh assessment is different from it, any amount over paid by the dealer shall be refunded to him without interest, or the further amount of tax, if any, due from him shall be collected in accordance with the provisions of this Act, as the case may be.
(c) Penalty, if any, imposed and collected under sub-section (5), shall be refunded to the dealer without interest on cancellation of the order of original assessment."

"Procedure to be followed in assessment of certain cases. 25. (1) If no return is submitted by the dealer under section 21 within the prescribed period, or if the return submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority may, after making such enquiry as it considers necessary, determine the tax payable by the dealer to the best of its judgement: Procedure to be followed in assessment of certain cases.
Provided that, before taking action under this sub-section on the ground that the return submitted by the dealer is incomplete or

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incorrect, the dealer shall be given a reasonable opportunity of proving the correctness or completeness of the return submitted by him.
(2) If the assessing authority has reason to believe that the tax determined by it for any period was based on too low a turnover or was made at too low a rate or was based on too high a turnover or was made at too high a rate it may enhance or reduce, as the case may be, such determination of tax:
Provided that before making an enhancement of the tax payable as aforesaid, the assessing authority shall, give a reasonable opportunity to the dealer to show cause against such enhancement and make such enquiry as it may consider necessary.
(3) The determination and collection of tax under this section shall be subject to such adjustment as may be prescribed on the completion of assessment in the manner prescribed."

"Assessment of escaped turnover and wrong availment of input tax credit. 27. (1) (a) Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (3), at any time within a period of five years from the date of assessment order by the assessing authority, determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary.

(b) Where, for any reason, the whole or any part of the turnover of business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of five years from the date of order of assessment by the assessing authority, reassess the tax due after making such enquiry as it may consider necessary.
(2) Where, for any reason, the input tax credit has been availed wrongly or where any dealer produces false bills, vouchers, declaration certificate or any other documents with a view to support his claim of input tax credit or refund, the assessing authority shall, at any time, within a period of five years from the date of order of assessment, reverse input tax credit availed and determine the tax due after making such a enquiry, as it may consider necessary:
Provided that no order shall be passed under sub-
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sections (1) and (2) without giving the dealer a reasonable opportunity to show cause against such order.”

5.An assessment is framed on the basis of the monthly returns of a dealer for any specific year in question. Section 22(2) casts a requirement on the Assessing Authority to accept the returns filed by a dealer by way of an assessment order, if the returns are accompanied by proof of payment of tax as well as the required statutory documents.

6.Section 22(3) provides for the procedure for scrutiny of returns submitted. Section 22(4) states that in circumstances, where the dealer has not filed returns or has filed incorrect or incomplete returns (in the opinion of the assessing authority), an enquiry shall be caused by the Assessing Authority upon such returns and an order of assessment shall be passed by the Assessing Authority after hearing the dealer. Remaining sub sections of Section 22 are not relevant for the purpose of this discussion.

7.Section 25 provides for a situation, where a return is submitted by the dealer which appears to be incorrect or incomplete or where no monthly return is filed by a dealer, when the assessing authority may provisionally assess the dealer to the best of his judgment, after hearing the dealer.

8.Section 27 provides for a revision of assessment, where the Assessing Authority is of the opinion that the whole or any part of the turnover of the business of a dealer has escaped assessment to tax at the original instance.

9.The above, thus, constitutes the scheme of assessment contemplated under the Act. In the present case, admittedly, no assessment in terms of Section 22(2) or 22(4) has been framed by the authority. This, in my considered view is a mandatory requirement, and no time frame is stipulated in this regard by statute. Also, admittedly, no provisional assessment in terms of Section 25 has been framed. While this is so, the Assessing Authority has issued notices dated 21.02.2014 and 24.03.2014, even prior to the completion of the year under assessment, which is 01.04.2013 to 31.03.2014. If at all these notices were to be acted upon, it can only result in a provisional assessment for a particular month within the year of assessment. Any notice issued for an assessment in terms of Section 22(2) or 22(4) can be issued only for the entire year of assessment in question and would necessarily have to be issued only after 31 of March of the respective year. This having not being done in the present case, I am of the view that the revision is bad in law.

10.The provisions of Section 27 require an assessment to have been framed originally in order that the Assessing Authority may come to a legitimate conclusion that there is escapement of tax. If

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there is no assessment that has been framed at the original instance, there can evidently be no support for the conclusion of the Assessing Authority that tax has escaped assessment.

11. I take a cue in this regard from a decision of the learned single judge of this Court in Kanchi Bakers & Sweets Vs. Assistant Commissioner (CT), Villivakkam Assessment Circle, Chennai ([2009] 23 VST 283 (Mad)), where the Court has considered the validity of a provisional assessment under Section 25 of the Act. In conclusion the Court states as follows:

> 'A bare reading of section 25(1) of the Act, would show that the assessing authority is entitled to invoke section 25(1), in cases where no return is submitted by the dealer under Section 21, within the prescribed period or if the return submitted by the dealer appears to be incomplete or incorrect. As seen from the relevant part of the impugned assessment orders extracted above, the respondent has not stated any of the contingencies which has led to the impugned orders being passed under section 25 of the Act. In other words, the impugned orders do not show that the petitioner either failed to file a return under section 21 of the Act, within the prescribed period-or-filed a return with incomplete or incorrect particulars. Since the pre-requisites for invoking section 25(1) are not indicated in the impugned orders, to have been satisfied, the respondent could not have invoked section 25 of the Act.
>
> On the contrary, the impugned orders show that the petitioner has actually reported a total and taxable turnover in the monthly returns filed in respect of both the assessment years. Therefore it cannot be presumed, in the absence of a statement contained in the impugned assessment orders that the contingency for invoking section 25 had arisen in these cases.
>
> If the petitioner had actually filed a return in accordance with section 21, then the assessing authority is obliged under section 22(2) to pass an order on the basis of the return. Of course, the said order does not attain finality in view of the power conferred upon the Commissioner to reopen the same at any time. Even Section 22(4) enables the assessing officer to pass a best-of-judgment assessment order, if no return was submitted by the dealer. Therefore, it is clear that the occasion for the respondent to pass an order under Section 25 of the Act, is not borne out at least from the impugned orders. In such circumstances, I am of the considered view that the impugned orders are liable to be set aside and the

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respondent should be directed to proceed in accordance with law.'

12.In the light of my conclusions above to the effect that the impugned orders of assessments are jurisdictionaly vitiated, I do not see any reason to advert to the merits of the matter.

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12.These writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

To

The Commercial Tax Officer,
Kulithalai Assessment Circle,
Kulithalai.

+1 CC to M/s.R.HEMALATHA, Advocate (SR-77554[F] dated 25/07/2019)

+1 CC to M/s.SPL GP (SR-77992[F] dated 26/07/2019)

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